

**Bargaining on the U.S. Supreme Court: Justices' Responses to Majority Opinion Drafts**



James F. Spriggs II; Forrest Maltzman; Paul J. Wahlbeck

*The Journal of Politics*, Vol. 61, No. 2 (May, 1999), 485-506.

Stable URL:

<http://links.jstor.org/sici?sici=0022-3816%28199905%2961%3A2%3C485%3ABOTUSC%3E2.0.CO%3B2-3>

*The Journal of Politics* is currently published by Southern Political Science Association.

---

Your use of the JSTOR archive indicates your acceptance of JSTOR's Terms and Conditions of Use, available at <http://www.jstor.org/about/terms.html>. JSTOR's Terms and Conditions of Use provides, in part, that unless you have obtained prior permission, you may not download an entire issue of a journal or multiple copies of articles, and you may use content in the JSTOR archive only for your personal, non-commercial use.

Please contact the publisher regarding any further use of this work. Publisher contact information may be obtained at <http://www.jstor.org/journals/spsa.html>.

Each copy of any part of a JSTOR transmission must contain the same copyright notice that appears on the screen or printed page of such transmission.

---

JSTOR is an independent not-for-profit organization dedicated to creating and preserving a digital archive of scholarly journals. For more information regarding JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

## ***Bargaining on the U.S. Supreme Court: Justices' Responses to Majority Opinion Drafts***

James F. Spriggs II

University of California, Davis

Forrest Maltzman

George Washington University

Paul J. Wahlbeck

George Washington University

Supreme Court opinions contain legal rules with broad policy ramifications, and justices try to shape the substance of the Court's opinions. Despite this expectation, scholars have neither systematically measured nor explained the extent to which justices attempt to affect majority opinions. We articulate and test a model that explains how justices respond to majority opinion drafts. Our argument is that justices decide how to respond based on the effect a choice will have on securing their policy goals. The costs or benefits of a choice, moreover, are a function of strategic and contextual factors, including a justice's agreement with an opinion, the collaborative decision-making setting on the Court, case characteristics, and attributes of the justices. Our data analysis strongly supports our argument showing that, among other considerations, justices' responses result from their disagreement with an opinion, the author's prior level of cooperation with them, and the salience of a case.

**D**ecision making on the U.S. Supreme Court is a collaborative enterprise among the justices. Although majority opinion authors exert a disproportionate influence over the doctrines developed in opinions, they cannot act unilaterally (Baum 1989; Maltzman and Wahlbeck 1996a; Rohde and Spaeth 1976; Slotnick 1979). The collaborative nature of the opinion-writing process stems largely from the author's need to have a majority of justices join the opinion once it is circulated before it becomes the opinion of the Court. This institutional rule therefore provides incentives for justices to bargain with the majority opinion

All authors contributed equally to this paper. We wish to thank Sarah Binder, Scott Gartner, John Gates, Bob Jackman, Lee Sigelman, and Harold Spaeth for helpful comments, and Mary DeCamp, Jennifer Saunders, and Tressa Tabares for their research assistance. Spriggs acknowledges grants from the Committee on Research of the Davis Division of the Academic Senate of the University of California, from the U.C. Davis Washington Center, and from the U.C. Davis Program on Economy, Justice, and Society. Maltzman and Wahlbeck recognize the support of National Science Foundation grant SBR 9512817 for the collection of the assignment data and the George Washington University Junior Scholar Incentive Award and the University Facilitating Fund. A previous version of this paper was presented at the 1996 meeting of the Midwest Political Science Association.

author and for the author to sometimes accommodate their concerns. Thus, at the heart of the decision-making process are policy-oriented justices who employ a "mixture of appeals, threats, and offers to compromise" (Murphy 1964, 42) to encourage their colleagues to support legal rulings that reflect their policy preferences. As Justice William Brennan put it: "Before everyone has finally made up his mind [there is] a constant interchange among us . . . while we hammer out the final form of the opinion" (Brennan 1960, 405). Or, as Justice Tom Clark wrote succinctly, once the opinion draft is circulated, "the fur begins to fly" (1959, 51; as quoted in O'Brien 1996, 307).

Political scientists, however, have not systematically studied the politics and tactics central to the opinion-writing process. Although published work often mentions the importance of compromise, bargaining, and negotiation on the Court, what little empirical support that exists derives from journalistic, historical, or case study sources (Cooper 1995; Murphy 1964; Schwartz 1985, 1988, 1990, 1996; Simon 1995; Ulmer 1971; Westin 1958; B. Woodward and Armstrong 1979). As a result, political scientists possess little theoretical or empirical knowledge about the extent or influence of justices' responses to draft majority opinions.

Although scholars have begun to examine majority opinion authors' efforts to accommodate their colleagues (Epstein and Knight 1998; Johnson 1996; Wahlbeck, Spriggs, and Maltzman 1998), they have not yet systematically considered the full range of "appeals, threats, and offers to compromise" that justices use to influence the majority opinion author. We use data derived from Justice Brennan's personal papers to examine the responses of justices to majority opinion drafts. Our basic claim is that justices are rational actors, choosing how to respond to majority opinion authors based on the effects alternative choices have on achieving their policy objectives. These effects are determined in part by the choices made by their colleagues.

### Justices' Responses to Majority Opinion Authors

The crafting of the majority opinion is shaped, as Justice Brennan put it, by the deliberative process. After an opinion is assigned to a particular justice, he or she begins to write a draft opinion for the Court. Once the author "has an unanswerable document," it is circulated to the other justices (Clark 1959, 51). Court custom is for the justices to respond to the draft opinion in writing, noting their support, concerns, suggestions, or the like (Rehnquist 1987, 302; B. Schwartz 1996, 7). The author circulates subsequent majority opinion drafts to respond to the concerns expressed by justices, and other justices respond with subsequent memoranda or separate opinions. This process continues until every justice joins either the majority opinion or a separate opinion circulated by another justice.

Although justices who do not vote with the majority coalition at conference have a minimal role in shaping the majority opinion (Wahlbeck, Spriggs, and

Maltzman 1998), every member of the majority has the opportunity to influence the content of the majority opinion through the deliberative process. Indeed, one expects justices to expend time and resources trying to shape the Court's opinion given the impact of the legal rules undergirding majority opinions (see Spriggs 1996). To influence the opinion writer, justices have available a variety of means beyond simple persuasion and personal regard, and they must choose which is most likely to produce the desired effect. As Murphy writes, "a justice must learn not only how to put pressure on his colleagues but how to gauge what amounts of pressure are sufficient to be 'effective' and what amounts will overshoot the mark and alienate another judge" (1964, 57). Other than simply joining the majority opinion, justices in the majority conference coalition may choose to appear unsure, make suggestions with or without threats, circulate or join a draft concurrence, or change votes and circulate or join a draft dissent.

One tactic justices regularly use is to inform the justice who drafted the majority opinion that they are unwilling to join the opinion until subsequent majority or minority opinions are circulated. For example, in 1973 Justice Harry Blackmun responded to a draft opinion that Justice Thurgood Marshall circulated by writing, "I still have trouble with the recirculation of March 27. I, therefore, shall wait for any dissent, in whole or in part, that may be forthcoming" (Blackmun 1973). Because justices who vote with the majority at conference normally "join [the majority opinion] without waiting for circulation of the dissent" (Rehnquist 1987, 303), notifying the opinion author that one is unprepared to join has two effects. First, it signals the author that the justice might want changes made to the opinion. Indeed, when a justice who initially supported the majority coalition informs the majority opinion author that he or she wants to await subsequent developments, the author is likely to accommodate that justice by circulating additional drafts of the majority opinion (Wahlbeck, Spriggs, and Maltzman 1998). Second, it enhances the subsequent bargaining leverage of the justice. As Murphy explains, "an uncommitted justice has great bargaining advantages, advantages which a deeply committed justice might assume by appearing unsure" (1964, 58).

If a justice wants to express particular problems with the opinion, he or she may suggest that the opinion author add or delete a phrase, a sentence, or a paragraph in the opinion. For instance, Justice Stewart wrote Chief Justice Burger a memo after Burger circulated a draft opinion in *Griggs v. Duke Power Company* (1971): "I am still unhappy with the discussion appearing on page 9. . . . Would you be willing to eliminate the word 'well' in the 7th line from the bottom of page 9 and to consider the deletion of the last sentence on that page[?]" (Stewart 1971). A suggestion presents the opinion author with a substantive proposal for changing the draft majority opinion.

In contrast to a suggestion, justices can try to entice the majority opinion author to modify his or her opinion by threatening not to join the opinion unless specific changes are made. For example, Justice Hugo Black, the author of the

majority opinion in *Detroit and Toledo Shore Line v. United Transportation Union* (1969), received the following statement from Justice Potter Stewart: "At the risk of seeming unreasonably stubborn, I am still unwilling to join your opinion so long as it contains the view expressed in the phrase 'over a long period of time' in the 6th line on page 12" (Stewart 1969). As Murphy explains, "threats to change a vote or to write a separate opinion, dissenting or concurring, are the sanctions generally most available to a justice" (1964, 57).

A justice can also circulate a concurring opinion to express disagreement with the majority opinion's legal rationale. There are at least two reasons to write separately. First, a justice may want to circulate a separate opinion as a way of affecting the legal principles undergirding the majority opinion. According to then Judge Ginsburg, separate opinions "when drafted and circulated among the judges . . . may provoke clarifications, refinements, modifications in the court's opinion" (1990, 143). In *Hawaii v. Standard Oil* (1972), Justice Stewart was dissatisfied with the draft opinion that Justice Marshall circulated for the Court. Stewart therefore circulated a concurring opinion that highlighted these differences. In response, Justice Marshall revised the majority opinion to address Justice Stewart's problems with the case. This led Justice Stewart to reply, "Your opinion, as recirculated yesterday, resolves my problems with this case, and I am glad to join it. I shall withdraw my concurring opinion" (Stewart 1972).

If the majority opinion author does not revise the opinion to reflect a concurring justice's concerns, a concurring opinion can ultimately serve as a sanction by articulating the flaws in the majority opinion. As Murphy explains, "The two major sanctions which a justice can use against his colleagues are his vote and his willingness to write opinions which will attack a doctrine the minority or majority wishes to see adopted" (1964, 54). Indeed, Justice Powell remarked to Justice Rehnquist that "[y]our memorandum does 'lean' rather strongly in favor of Firestone. . . . As I would like at least to alert our friends in Florida that some of us here lean the other way on the evidence, I will write a brief concurring opinion" (Powell 1975).

Finally, a justice can circulate or join a dissenting opinion and thus change his or her vote from the majority to the minority. Justices sometimes find themselves in a position in which the dissenting views more closely reflect their position than the majority opinion. In these instances, justices can respond by circulating or joining a draft dissenting opinion (Hagle and Spaeth 1991; Maltzman and Wahlbeck 1996b).

### Explaining Justices' Responses to Majority Opinion Authors

In each case, justices must choose how they will pursue their policy preferences within the constraints imposed by their colleagues and the decision-making setting. The choice of different replies, moreover, can result in dissimilar costs or benefits to a justice. Justices, we argue, are primarily motivated by a concern for

public policy and want Court outcomes to be as consistent with their policy objectives as possible (Knight and Epstein 1996; Murphy 1964; Rohde 1972a, 1972b). The course of action that a justice pursues is therefore likely to depend in part on the implications a particular choice holds for a justice's ability to successfully introduce his or her policy objectives into law. Given that decision making on the Court is a collaborative enterprise, justices also act strategically, making decisions based in part on the choices made by their colleagues. Further, the costs or benefits of a particular choice are shaped by the nature of a given case and the characteristics of the justices themselves. Justices, in short, pursue their policy preferences within numerous and often countervailing constraints.

### *Opinion Distance*

The need for a justice to respond to a draft opinion is obviously a function of the extent to which the majority opinion is acceptable to the justice. As Murphy suggests,

His [the strategic justice's] initial step would be to examine the situation on the Court. In general three sets of conditions may obtain. There may be complete coincidence of interest with the other justices, or at least with the number of associates he feels is necessary to attain his aim. Second, the interests of the other justices, or a majority of them, may be indifferent to his objective. Third, the interests of his colleagues may be in opposition to his own (1964, 37).

If an opinion is acceptable to a justice, there is little need for a justice to push assertively to change it or to write separately. Indeed, if there is what Murphy terms a "complete coincidence of interest," a justice who initially voted with the majority would be expected to sign the majority opinion as soon as it is circulated. Conversely, when an opinion is distant from the justice's preferred position, the justice is not likely to simply join the opinion, but will respond to move the opinion closer to the justice's position.

The extent to which a particular opinion reflects a justice's policy preferences depends on several factors. Because authors have a disproportionate influence over the final opinion, one factor that will determine whether an opinion is acceptable to a justice is his or her ideological proximity to the author. Second, although opinion authors have a significant role in developing the final opinion, they cannot act unilaterally. The author's choices regarding the opinion's legal reasoning are in part structured by the choices of other justices (Brenner and Spaeth 1988; Epstein and Knight 1998; Murphy 1964; Rohde and Spaeth 1976; B. Schwartz 1996; Wahlbeck, Spriggs, and Maltzman 1998). As a result, we expect a justice will find an opinion more acceptable when the coalition supporting it has views similar to those of the justice. These relationships lead us to anticipate:

*Hypothesis 1: The closer a justice is ideologically to the majority opinion author, the less likely the justice will circulate a wait statement, suggestion, threat, concurrence, or dissent.*

*Hypothesis 2: The closer a justice is ideologically to the original majority coalition, the less likely the justice will circulate a wait statement, suggestion, threat, concurrence, or dissent.*

### *Collaborative Decision Making*

Decision making on the Court is a collective enterprise among the justices. To get policy outcomes as close as possible to their own policy positions, justices must at a minimum consider the choices made by their colleagues (Epstein and Knight 1998; Murphy 1964; Schubert 1959, chap. 4). Strategic justices will therefore consider the way in which their choices, in combination with the decisions made by other justices, will result in collective outcomes (Baum 1996). Decision making on the Court is thus strategic because the consequences of a justice's decision are in part a function of the choices made by other justices.<sup>1</sup>

One important strategic consideration pertains to the size of the majority conference coalition. In order to set precedent, an opinion must be supported by a majority of the justices on the Court. Thus, when the initial majority coalition is small, each majority coalition member's vote is more valuable to the opinion author (Murphy 1964). According to Chief Justice Rehnquist:

The willingness to accommodate on the part of the author of the opinion is often directly proportional to the majority result at conference; if there were only five justices at conference voting to affirm the decision of the lower court, and one of those five wishes significant changes to be made in the draft, the opinion writer is under considerable pressure to work out something that will satisfy the critic, in order to obtain five votes for the opinion (1987, 302).

Thus, justices are less likely to accept opinion language with which they disagree when the original coalition is small. We therefore expect:

*Hypothesis 3a: The smaller the majority conference coalition, the more likely the justice will circulate a wait statement, suggestion, or threat.*

Past research also demonstrates that because justices have more leverage over majority opinion authors when the conference coalition is small, authors are more likely to accommodate their colleagues' concerns (Murphy 1964, 65; Rohde 1972a, 1972b, 1972c; Wahlbeck, Spriggs, and Maltzman 1998; see Riker 1962; Riker and Niemi 1962). We therefore argue that the conference vote margin affects the circulation of separate opinions differently than it does the other type of responses. While justices who are part of a small majority coalition will be more likely to, for example, propose a suggestion, they will not be as likely to take the effort to draft a separate opinion. The reason is simple: if the coali-

<sup>1</sup> In this paper, we do not examine other forms of strategic behavior, such as sophisticated voting. Sophisticated voting occurs when a justice casts a vote (or supports a legal doctrine) contrary to his or her preferred position. To act strategically, justices do not necessarily have to vote contrary to their policy preferences; rather, all that is required is that "before making up his mind each agent has to anticipate what others are likely to do" (Elster 1986, 7; cf. Baum 1996).

tion is small, then the author is more likely to accommodate a justice's concerns, and thus a separate opinion is less necessary. Given the increased likelihood of accommodation with small conference coalitions, we expect the following:

*Hypothesis 3b: The smaller the majority conference coalition, the less likely a justice will circulate a draft concurrence or dissent.*

Since justices are engaged in long-term interactions with their colleagues, it seems reasonable to expect that over time they learn to cooperate and engage in reciprocity, rewarding those who have cooperated with them in the past and punishing others (see Axelrod 1984; E. Schwartz 1996). Murphy (1964, 52), for example, argues that a justice can "build up a reservoir of good will for later use" by joining the majority opinion despite having certain reservations about it. Justices might also punish colleagues who fail to cooperate with them. According to Segal and Spaeth (1993, 294–95), Justice O'Connor's difficulty in forming majority opinion coalitions (as seen by the frequency with which she authored plurality opinions) was partially due to her unwillingness to suppress her concurring opinions, which inclined other justices to concur when she was authoring a majority opinion. Given the possibility of tit-for-tat relationships, we expect:

*Hypothesis 4: A justice is more likely to circulate a wait statement, suggestion, threat, concurrence, or dissent if the majority opinion author has not cooperated with him or her in the past.*

### Case Characteristics

The costs or benefits of a particular choice are also a function of characteristics specific to a case. Our first case factor recognizes that not every case is equally important to the justices (Slotnick 1978). Since the legal doctrine created in salient cases can have wide-ranging economic, political, and social implications, justices are likely to be more concerned about such opinions. However, if a justice views a case as relatively unimportant, he or she is more likely to resist paying the personal and workload costs associated with responding to the author. Chief Justice Warren Burger's memo to Justice Hugo Black in 1971 about Black's opinion in *Astrup v. Immigration and Naturalization Service* (1971) illustrates that case salience can affect a justice's calculations. Burger wrote, "I do not really agree but the case is narrow and unimportant except to this one man. . . . I will join up with you in spite of my reservations" (Burger 1971). Because case importance involves both a legal and political dimension (Cook 1993), we propose two hypotheses:

*Hypothesis 5a: The more politically salient a case, the more likely a justice will circulate a wait statement, suggestion, threat, concurrence, or dissent.*



*Hypothesis 5b: The more legally salient a case, the more likely a justice will circulate a wait statement, suggestion, threat, concurrence, or dissent.*

The capacity of a majority opinion author to write an opinion that satisfies a majority of the Court is also a function of case complexity, which relates to the quantity and difficulty of legal issues and problems raised in a case. If a case is especially complex, we expect the majority opinion author to be less likely to have crafted a draft opinion that successfully addresses all pertinent concerns of a justice. Thus, we expect:

*Hypothesis 6: The more complex a case, the more likely a justice will circulate a wait statement, suggestion, threat, concurrence, or dissent.*

Another factor that might affect the willingness of a justice to challenge the opinion author is the time available to complete work on a case. Taking an aggressive stance, such as making a threat or writing a concurrence, forces a justice to incur extra work. Toward the end of a term, justices recognize that workload pressures are exacerbated, which may discourage them from taking assertive stances. This is illustrated in a memo from Justice John Harlan to Chief Justice Burger in June 1971: "I am glad to join your opinion in each case. If end-of-Term pressures permit, I may write something in addition" (Harlan 1971). Such pressures suggest the following relationship:

*Hypothesis 7: The closer the end of the Court's annual term, the less likely a justice will circulate a wait statement, suggestion, threat, concurrence, or dissent.*

### *Justice Attributes*

Attributes of the justices themselves are also likely to affect the consequences of a specific response to an opinion author. First, the process of new justices assimilating to the Court may affect the way they respond to opinion authors' draft opinions. Political scientists have long speculated that justices take a few years to develop experience and to become comfortable on the Court (Hagle 1993; Howard 1968). This process of adjustment may, for example, cause justices to avoid conflict and take more neutral stances, vote more moderately, or vote in somewhat unstable patterns (Howard 1968; Snyder 1958; Ulmer 1959; Walker, Epstein, and Dixon 1988; Wood et al. 1998). If "freshmen" justices are more deferential, then we expect the following:

*Hypothesis 8: Justices will be less likely to circulate a wait statement, suggestion, threat, concurrence, or dissent when they are new to the bench than later in their careers.*

In addition, the chief justice occupies a leadership role that may influence his willingness to respond to majority opinion authors. For example, he assigns

majority opinions when in the majority, presides over conference discussions, speaks and votes first at conference, and handles the Court's administration (Danelski 1968). These powers place chief justices in a position to influence various aspects of decision making, and as Ulmer argues, they therefore "have some unique reasons for discouraging conflict in the Courts and avoiding the dissenting position generally in casting their individual votes" (1986, 51). We thus expect that:

*Hypothesis 9: The chief justice will be less likely than other justices to circulate a wait statement, suggestion, threat, concurrence, or dissent.*

The amount of outstanding work a justice has is also likely to affect his or her responses to the majority opinion author. Given that the chief justice takes a justice's workload into consideration when making opinion assignments (especially as the Court approaches the end of a term), justices themselves likely do not consider workload considerations to be trivial (Maltzman and Wahlbeck 1996a, 1996b). A memo from Justice Black to Justice Brennan illustrates the importance of workload considerations in justices' choices. Black wrote, "I voted to reverse these cases and uphold the ICC's action. . . . I have decided to acquiesce in your opinion and judgment unless someone else decides to write in opposition" (Black 1970). Black was willing to dissent only if someone else would incur the costs associated with writing a dissent.

*Hypothesis 10: A justice with a heavy workload is more likely to simply join an opinion and less likely to circulate a wait statement, suggestion, threat, concurrence, or dissent.*

### Data and Methods

To test these hypotheses, we examined the first response that each majority conference coalition justice made to the majority opinion author in each of the 2,265 cases decided during the Burger Court (1969-85 terms).<sup>2</sup> Because the options available to the majority opinion author systematically differ from those of other justices, we excluded the justice who was assigned the majority opinion from the analysis. This approach produced 12,562 observations. We model the first response of each justice to the majority opinion author's draft opinion because this initial response clearly articulates a justice's attempt to shape the draft opinion. Moreover, most justices (80.4%) only adopt one response and thus their initial position in a case represents their only interaction with the author.

<sup>2</sup>We therefore included all full signed, per curiam, or plurality opinions decided during this time period, as found in Spaeth 1994. Also, if more than one justice circulated a majority opinion, we treated the final opinion author as the majority opinion author. In 49 of the 2,265 cases included in our analysis, more than one justice circulated a majority opinion draft. In most of these cases, this occurred because of a shift in the majority. This means that for these cases the justices agreeing with the final author's position at conference are treated as majority coalition justices.

Because a justice's initial position also affects his or her final case decision, we discuss below the subsequent actions taken by the justices and how they relate to their initial bargaining position.

Our dependent variable for justices' first responses to authors contains six categories: join majority opinion; circulate a wait statement; make a suggestion; articulate a threat; circulate or join a draft concurring opinion; circulate or join a draft dissenting opinion. Since our dependent variable is nominal with multiple categories, the appropriate estimator is multinomial logit (Aldrich and Nelson 1984; Greene 1993; Maddala 1983). This technique estimates the likelihood that a response will be chosen compared to another alternative, which serves as a base, and it therefore yields five sets of estimates. Since we use "join majority" as the model's baseline, the estimates for each type of response capture a justice's tendency to criticize the majority opinion rather than join it.<sup>3</sup>

To determine whether a justice initially voted with the majority, we relied upon the docket sheets maintained by Justice William Brennan.<sup>4</sup> To determine whether a justice informed the majority opinion author that he or she intended to wait,<sup>5</sup> made a suggestion,<sup>6</sup> made a threat, or circulated or joined either a concurrence or a dissent,<sup>7</sup> we used the detailed circulation records that Justice Brennan maintained.<sup>8</sup>

Justice Brennan's circulation records provide a comprehensive list of all opinion drafts, and letters and memoranda written by any member of the Court and circulated to the conference. Since the Burger Court, justices have exchanged their views almost exclusively in writing (B. Schwartz 1996, 7). Thus, justices make suggestions, threats, or announce positions to the opinion author in a let-

<sup>3</sup> Also, as each of the justices in these data appears repeatedly over time, it is therefore possible that the residual for a particular justice's decision in one case is correlated with the residual for that justice in another case (see Stimson 1985). We control for correlated errors by using the robust variance estimator, which relaxes the independence assumption (White 1980).

<sup>4</sup> The justices' docket books, and especially Justice Brennan's, provide a highly reliable record of how justices voted at the initial conference on a case's merits (Maltzman and Wahlbeck 1996c).

<sup>5</sup> We coded majority coalition justices as waiting if they sent the majority opinion author a letter stating that they were waiting for other opinions, subsequent drafts, and the like.

<sup>6</sup> If a majority conference coalition justice sent a letter that contained a suggestion about how to change the majority opinion, we coded that justice as having made a suggestion. If the letter explicitly made a suggestion a condition for joining the opinion or threatened to join another opinion if a suggestion was not followed, we coded the justice as having made a threat.

<sup>7</sup> Majority coalition justices' actions were coded as concurrence if they did not announce that they were dissenting and circulated or joined a concurrence, an opinion concurring in part/dissenting in part, or an opinion simply labeled a separate opinion. We coded justices as dissenting if, according to Brennan's records, they either circulated or joined a draft dissent.

<sup>8</sup> To assess the reliability of our coding of Brennan's sheets, a set of coders independently coded two randomly selected terms from Brennan's circulation records ( $N = 1,585$ ). The coder interagreement for the dependent variable in this study was 97.8%. The kappa statistic of .94 indicates that this intercoder agreement is significantly greater than would be expected by chance.

ter, and copies of these letters are usually sent to the entire conference (Powell 1980, 455; Rehnquist 1987, 302).<sup>9</sup> For each case, Brennan's staff recorded all of this information for him on a circulation sheet. To confirm the accuracy of the circulation sheets, we randomly selected one term and examined the extent to which Brennan's sheets comported with the memos and draft opinions contained in his case files. Our test indicates that Brennan's circulation sheets accurately itemize the documents contained in his case files.<sup>10</sup>

Our data on justices' bargaining, however, may be underinclusive since they do not include "private" memos—that is, memos circulated between two or more justices but not sent to the entire conference. Our comparison of Brennan's circulation record with the content of his case files revealed that there are very few private memos. Indeed, of 2,091 documents, there are only 12 items (0.6%) of private correspondence sent from or received by Justice Brennan.<sup>11</sup> More importantly, our coding of the justices' first responses to the majority opinion would be affected by only 2 of these 12 private memos (0.3%) in our randomly selected term.<sup>12</sup>

### *Independent Variables*

**AUTHOR DISTANCE.** We calculated an issue-specific compatibility score between the author and each justice in the majority conference coalition for every case. This score is determined by using original conference data, Spaeth's (1994) 12 substantive value groups, and the percentage of cases in which each justice voted

<sup>9</sup>Thus, we are not overly concerned that we are missing bargaining that occurred over the telephone or face-to-face. Memos in Brennan's case files suggest that justices during the Burger Court followed up any such communication with a written letter.

<sup>10</sup>We coded all memos and draft opinions from Brennan's case files for one randomly selected term. Of the 2,091 documents that we identify from the circulation records or case files, 86.4% of them were found in both sources; 144 items (6.9%) were missing from the case file but included on the circulation sheet. These items were generally a draft opinion or a justice's "join" of an opinion. Because our data are taken from the circulation records, these items are included in our analysis. A total of 140 documents (6.7%) were contained in the case files, but excluded from the circulation records. While these data are not included in our analysis, it is important to note that these documents generally related to administrative matters, such as a justice being "out" in a case, holding a case pending another decision, or reassigning a case. Memos missing from the circulation sheets are generally nonbargaining in nature. The circulation sheets are the best source of information about the bargaining process that is currently available.

<sup>11</sup>Scholars cannot obtain all private memoranda that have been circulated by the justices since the papers of all justices serving during this period are not available. It would be inadvisable to use the private memos contained in the available papers of Justices Douglas, Brennan, Marshall, and Powell since they only include memos sent either to or from these justices, and thus their use would produce a biased set of private memos.

<sup>12</sup>The remaining 10 private memos pertain to written dissents or concurrences, were circulated by the opinion author, or were administrative. One of the private memos was a threat, but it was not the justice's first response.

for the liberal outcome (Epstein et al. 1994, table 6-1).<sup>13</sup> The score is computed by taking the absolute value of the difference between the justice's value-specific liberalism and the majority opinion author's liberalism.<sup>14</sup> Thus, if the justice's ideology is identical to the author's, the author distance is zero. The more distant the justice is from the majority opinion author, the higher the score.

**COALITION DISTANCE.** We calculated the absolute difference between the justice's issue-specific ideology and the conference coalition's mean ideology (excluding the author). This score is based upon the 12 substantive value groups identified by Spaeth (1994). For each of these 12 areas, we calculated the percentage of cases in which each justice voted for the liberal outcome (Epstein et al. 1994, table 6-1). Greater ideological distance between the justice and the conference coalition's ideology produces a larger positive score.

**WINNING MARGIN.** Using the original docket books of Justice Brennan, we identified the vote of each justice and calculated the size of the winning conference coalition. Specifically, to measure the conference margin, we subtracted the number of votes needed to form a winning coalition from the number of justices who voted with the author.<sup>15</sup>

**COOPERATION.** To measure the degree of previous cooperation between a justice and the author, we calculated the percentage of time that the author joined a sep-

<sup>13</sup> Spaeth (1994) identified 13 value groups, which represent broad issue areas (e.g., criminal procedure, civil rights, federalism). His 13th group consists of miscellaneous cases. Of the 2,307 cases where an assignment was made or a signed opinion released during the Burger Court, 10 were placed by Spaeth in the 13th category. Because of the ambiguous nature of this value area, we dropped from our analysis these 10 cases. We also dropped two cases that are not included by Spaeth (1994) because, although they were argued and drafts were circulated, the cases were rescheduled for argument the following term and no opinion was released. For 153 of the 2,265 cases included in our study, Spaeth attributed the case to two of the value categories. In these instances, we assumed that each justice's ideological score was the average of the two value areas. We dropped four additional cases because the majority opinion author was the only justice who supported a particular disposition. Also, if the Court released a per curiam opinion, then we determined who authored it by using the opinion assignment sheets circulated by the chief justice.

<sup>14</sup> Although some have suggested that justices' preferences will vary with case facts and issue areas (see Rohde and Spaeth 1976), we think the loss of generalizability that occurs when one selects a narrow issue area, as is necessary to identify relevant case facts, is not worth the minimal gain in measurement accuracy. Ultimately, we believe that aggregate voting patterns adequately reflect the justices' preferences in an issue domain.

In four cases, the opinion was written by a three-justice team. In these cases, we used the median justice's ideology for the author. We also used this corrective in creating our *Cooperation* variable for these four cases.

<sup>15</sup> There were several cases in which there was no clear majority supporting one position at conference. For instance, in 105 cases, only a plurality favored the dominant position, the Court was equally divided, or the assigned author was a member of the conference minority. In these cases, the margin variable took on a negative value to reflect the author's need to attract additional votes before gaining a majority.

arate opinion written by the justice in the previous term.<sup>16</sup> The number of separate opinions written by each justice and the number of those separate opinions that the author joined is drawn from Spaeth (1994). To purge our measure of cooperation of ideological compatibility between justices, we regressed the percentage of time the author joined another justice's separate opinions on their ideological distance. We then used the residual from this regression as our measure of cooperation.

**POLITICAL SALIENCE.** We used the United States Supreme Court Data Base—Phase 2 (Gibson 1997) to ascertain the number of *amicus curiae* briefs filed in each case. We then created a dichotomous variable that assumes the value of one if the case contains at least 1.65 standard deviations more *amicus* briefs than the average number of briefs filed in all cases that term.<sup>17</sup>

**LEGAL SALIENCE.** To measure this concept, we determined (using Spaeth 1994) whether an opinion overturned precedent or declared a state or federal law unconstitutional. If a case overruled one or more of the Court's own precedents or overturned a piece of state or federal legislation, we coded the case as 1.

**CASE COMPLEXITY.** Although numerous measures of case complexity exist, none fully captures the concept. Thus, we measured case complexity by combining two indicators, both of which were derived from Spaeth (1994): the number of issues raised by the case and the number of legal provisions relevant to a case. Factor analysis of these two indicators produced a single factor with an eigenvalue greater than one. We adopted each case's factor score as the measure of complexity.

**END OF TERM.** We used a March 1 demarcation to mark the end of the term. If the first draft of the majority opinion was released after March 1, it was coded as 1; otherwise 0. To determine the day the first draft of an opinion was released, we used Justice Brennan's circulation records.

**FRESHMAN.** Any justice who had served less than two full years when oral argument was heard was coded as 1, otherwise 0. For our purposes, service time began on the day on which the oath of office was administered (Epstein et al. 1994, table 5-2).

**CHIEF JUSTICE.** We coded Chief Justice Burger as 1 and other justices as 0.

<sup>16</sup>We use joinder of separate opinions, rather than interagreement scores or joining of majority opinions, because they evidence cooperative behavior. Justices who prefer to concur or dissent can easily write their own opinion expressing their own reasons for disagreeing with the majority, but they instead coordinate their efforts. Alternative measures do not necessarily evidence cooperation.

<sup>17</sup>Since the amount of *amicus* participation has grown substantially over the past 25 years (Epstein 1993), we utilized term-specific mean and standard deviation.

**WORKLOAD.** The measure of each justice's workload is the number of majority opinions on which he or she was working on the day the first draft of the majority opinion was released. If an author had not yet circulated the final draft of an opinion, we assumed that he or she was working on the opinion.<sup>18</sup>

## Results

Conference majority justices' initial responses to the majority opinion author ranged from joining the majority opinion to circulating a draft dissent. Most (80.5%) justices' first action was to join the majority opinion. Only 2.8% of justices announced their intention to wait, a signal to the author that a draft opinion is unsatisfactory. Justices also made suggestions and threats to the opinion author in, respectively, 2.7% and 2.0% of their initial responses. Finally, 9.7% and 2.3% of justices circulated draft concurrences and dissents, respectively, as their first response to the author's draft opinion. Approximately 20.3% of cases, moreover, contained a suggestion or a threat from a member of the conference majority, and 13.2% of cases included a wait statement. In 58.8% of the cases, the majority opinion author received a response other than a join of the majority opinion from at least one member of the conference majority.<sup>19</sup>

Table 1 reports the results of a multinomial logit model of each majority conference coalition justice's initial response to the majority opinion author. The statistically significant chi-square test statistic indicates that we can reject the null hypothesis that all the independent variables jointly have no effect. The model also correctly predicts 80.5% of justices' responses to majority opinion authors, for a 42.7% reduction of error over a null model of random assignment of the justices to each of the responses.<sup>20</sup> As evident, the statistical analysis supports

<sup>18</sup> We determined the date of the final draft from Justice Brennan's circulation records, which contain, among other information, the dates on which all majority opinion drafts are circulated.

<sup>19</sup> The presence of bargaining memos in these data are suppressed for three reasons. First, and most important, they may be suppressed by opinion authors' preemptive accommodation of colleagues' concerns. That is, authors may accommodate other justices' concerns, as articulated at conference, in the first draft of an opinion and thus reduce their incentive to criticize the draft (see Spriggs, Wahlbeck, and Maltzman 1998). Second, Brennan's circulation records do not include "private" memos, which likely results in undercounting the amount of bargaining. Finally, these data only include responses by members of the majority conference coalition.

<sup>20</sup> We use tau, rather than lambda, as our proportional-reduction-of-error statistic. Goodman and Kruskal's tau is preferable to lambda, which simply compares the number of prediction errors from the model with the number of errors that would result from always predicting the modal category. Goodman and Kruskal's tau accounts for the distribution of cases across categories by computing expected errors that would result from randomly assigning cases to the different categories (Sigelman 1984, 78–79). Since we are interested in explaining all six categories of the dependent variable, we chose to use tau. Had we used lambda, however, the PRE would equal zero. We hasten to note, regardless of which approach we adopt, our coefficients are more important than the goodness-of-fit statistic. As King (1991) notes, the principal concern of most statistical analyses is estimating causal effects and thus goodness-of-fit is of secondary importance.

TABLE 1

## Multinomial Logit of Majority Coalition Members' Initial Responses to Majority Opinion Authors, 1969-1985: Terms

Variable	Wait Estimates (Robust Std. Error)	Suggestion Estimates (Robust Std. Error)	Threat Estimates (Robust Std. Error)	Concur Estimates (Robust Std. Error)	Dissent Estimates (Robust Std. Error)
Constant	-.3708 (.314)**	-3.679 (.248)**	-4.545 (.315)**	-2.723 (.189)**	-4.487 (.232)**
<i>Opinion Distance</i>					
Author distance	.020 (.004)**	.027 (.003)**	.035 (.005)**	.030 (.004)**	.018 (.002)**
Coalition distance	.006 (.013)	-.014 (.011)	-.021 (.013)	.014 (.005)**	.065 (.007)**
<i>Collaborative Decision Making</i>					
Winning margin	-.130 (.037)**	.070 (.042)	.213 (.050)	-.018 (.038)	.005 (.043)
Cooperation	-2.582 (.899)**	-1.509 (.679)*	-2.717 (1.390)*	-2.436 (.704)**	-4.079 (.677)**
<i>Case Characteristics</i>					
Political salience	.446 (.337)	.683 (.243)**	.458 (.259)*	.520 (.129)**	.191 (.251)
Legal salience	-.035 (.232)	.109 (.135)	-.441 (.326)	.401 (.150)**	-.125 (.299)
Case complexity	-.063 (.028)	.109 (.068)	-.024 (.082)	.087 (.015)**	.172 (.063)**
End of term	-.507 (.129)**	-.250 (.119)*	-.121 (.087)	-.068 (.075)**	-.145 (.146)
<i>Justice Attributes</i>					
Freshman	.058 (.464)	.182 (.271)	-.383 (.409)	-.112 (.155)	-.117 (.137)
Chief justice	-.820 (.134)**	-.676 (.155)**	-.546 (.164)**	-.239 (.010)**	-.418 (.178)**
Workload	.086 (.024)	-.020 (.029)	-.006 (.040)	-.038 (.017)*	-.069 (.039)*
Number of cases		12,562			
Chi-squared		666.35**			
Percentage correctly predicted		80.5			
Percentage reduction of error		42.7			

\*p ≤ .05 (one-tailed test); \*\* p ≤ .01 (one-tailed test)



our contention that justices' responses to opinion authors result from a variety of factors affecting the consequences of a choice.<sup>21</sup>

Our first set of hypotheses pertains to the extent to which a draft opinion comports with a justice's policy preferences. The statistically significant coefficients for *Author Distance* and *Coalition Distance* confirm that justices are more likely to respond to the author if they disagree with an opinion draft (as measured by ideological distance). Justices are more likely to adopt any type of response, rather than simply join the opinion, the more ideologically distant they are from the opinion author. They are also more likely to either concur or dissent the farther they are ideologically from the majority conference coalition. For example, when a justice is ideologically distant from, as opposed to aligned with, the majority opinion author, the likelihood that he or she will either choose to wait, make a suggestion, or articulate a threat increases by 160.0%, 327.7%, and 751.6%, respectively.<sup>22</sup> A similar pattern holds for ideological distance from the majority coalition: the occurrence of either concurrences or dissents increases by 58.6% and 2,206%, respectively, when a justice is distant from, rather than aligned with, the majority coalition.

We also argue that due to the collaborative decision-making setting on the Court justices make decisions in part based on the choices of their colleagues. According to Hypothesis 3, majority coalition members' reactions to the author vary inversely with the size of the conference coalition. The *Winning Margin* coefficient is significant for only one type of response, wait statements, and thus we find only minimal support for this hypothesis.<sup>23</sup> The simulation shows that when the majority coalition is minimum winning, compared to a surplus of four

<sup>21</sup> The results for wait statements, suggestions, threats, and concurrences do not change if we drop the dissent category from the dependent variable.

<sup>22</sup> Since multinomial logit estimates are not readily interpretable, we calculated the relative impact of each statistically significant variable while holding constant for all other factors at their means. These calculations indicate how each factor influences the proportion of justices' choices that fall into each tactic category. The *Author Distance* value for a justice who is "aligned" with the author equals 0. This would occur if the author and the justice were perfectly aligned. To ascertain the substantive impact of a justice being "ideologically distant" from the opinion author, we set the *Author Distance* score at 78.1. This is the largest score that exists. The figures for the "aligned" and "distant" *Coalition Distance* measures were set at 0 and 52.02, respectively. These are the smallest and largest *Coalition Distance* scores that exist. The values for *Cooperation* were set at the lowest and highest observed values of -.16 and .84. For *Case Complexity*, the complexity score was alternatively set at the highest complexity score for any of the 2,265 cases in our dataset (factor value of 6.89). This is compared to the "easy" case simulation where we set the complexity score at -.53, the minimum observed factor values.

In our discussion, we report the percent change in the likelihood of a particular tactic given two characteristics. For instance, the likelihood of a suggestion when the justice is ideologically aligned with the author is 1.66%, as compared to 7.10% when the justice is ideologically distant from the author. We take the difference between the two likelihoods (5.44%) and divide it by the likelihood of a suggestion from an ideologically aligned justice (1.66%). Thus, the impact of ideological proximity to the author on the probability of issuing a suggestion is 327.7%.

<sup>23</sup> We also tested for an interaction effect between *Author Distance* and *Margin*, finding that no such relationship existed.

votes in a 9-0 conference vote, a justice is 68.3% more likely to wait. Hypothesis 3b, that justices are less likely to concur or dissent when the conference majority is small, is not supported by the data. Hypothesis 4 argues that justices engage in tit-for-tat behavior, rewarding authors who have cooperated with them in the past and sanctioning others. The coefficients for *Cooperation* show that justices are less likely to express any type of disagreement, rather than join the majority, if the author had previously cooperated with them. The likelihood that a justice issues either a suggestion or a threat, for instance, is 2.5 and 11.1 times smaller, respectively, if an author had been entirely cooperative as opposed to uniformly uncooperative in the past.

The third set of factors taps the influence of case characteristics. We hypothesize that, due to policy-based considerations, justices will issue bargaining statements when cases are more salient. The results for *Political Salience* and *Legal Salience* generally support Hypothesis 5. *Political Salience* increases the occurrence of justices making suggestions, articulating threats, or circulating draft concurrences by 78.9%, 42.2%, and 51.5%, respectively. *Legal Salience* leads to a 44.3% increase in concurrences but has no influence on other types of responses. Consistent with Hypothesis 6, case complexity also somewhat affects a justice's response to the opinion author. Justices were much more likely to either circulate concurrences or dissents as their initial action in complex cases; the frequency of these actions increased by 68.3% and 216.0%, respectively. The approach of the end of the Court's annual term, moreover, decreases a justice's tendency to wait or make suggestions by 61.2% and 24.2%, respectively, but it has no effect on the other types of responses.<sup>24</sup>

Finally, we argue that attributes of justices affect their responses to majority opinion drafts. Hypothesis 8 concerns the initial responses of freshmen justices. We find no support for the notion that justices' choices differ when they are freshmen than later in their careers. Additionally, Chief Justice Burger was less likely to adopt any type of critical initial response than his colleagues. The likelihood of the chief waiting, making a suggestion, or proposing a threat, rather than joining the majority opinion, decreases, respectively, by 113.5%, 83.9%, and 62.7%. The size of a justice's workload influences only two types of responses, the circulation of concurrences and dissents. If justices are working on 15 majority opinion drafts (as opposed to 0), their circulation of either concurrences or dissents decreases by 71.9% and 174.4%, respectively.

### *Justices' Subsequent Responses*

The above model explains a justice's initial response to the majority opinion author's draft opinion for the Court, but justices occasionally make more than

<sup>24</sup> This result does not change if we instead measure the *End of Term* two different ways, either as an indicator variable for cases in which the first draft of the majority opinion was released after April 1 or as a continuous variable representing the number of days from the day the first draft was released until July 1.

one response to the author. During this time period, 19.6% of the justices adopted multiple tactics in a single case. Thus, we briefly explore the sequencing of subsequent responses. Over 91.1% of justices' subsequent responses take one of two forms: they either circulated or joined concurring or dissenting opinion drafts or they joined a subsequent draft of the majority opinion. In addition, very few justices articulated more than two responses to the author in a single case, and most of these actions consisted of multiple drafts of separate opinions—7.4%, 3.1%, and 1.4% of justices, respectively, made three, four, or five responses to the author. By examining the sequencing of justices' responses, we can provide additional leverage on the opinion-writing process.

We first examine the extent to which justices stake out an initial position and then join the majority opinion. Of the 2,463 times that justices made a second response to the author, 40.5% of them joined the majority opinion. Justices whose first action was either a suggestion or a threat, for instance, joined the majority opinion 59.9% and 42.9% of the time, respectively, in their second actions. Justices who first announced that they were awaiting subsequent developments joined less often, doing so in 35.8% of their second responses. Of those justices who concurred in the first round and then articulated a subsequent response, 17.5% actually joined the majority opinion. We suspect that the causal mechanism at work is the process of accommodation, with justices joining the majority opinion because the author has, at least to some extent, altered the majority opinion in keeping with their concerns.

The other dominant pattern in the data involves the movement from a first response that expressed some level of disagreement with the majority opinion to circulating or joining a concurring or dissenting opinion draft. Justices whose first response was to wait concurred as their second action 36.7% of the time. Of those justices who proposed a suggestion or articulated a threat, 21.3% and 21.0%, respectively, concurred in their second reaction to the author. Though a less frequent occurrence, justices occasionally switched their conference votes and circulated or joined a draft dissent. Of the justices who waited in their first response, 19.5% dissented in their second one. Only 2.6% of justices making a suggestion or a threat as their first response then dissented as their second action. As one would expect, justices also circulated second drafts of separate opinions as their second response: of those justices making a second response, those who either concurred or dissented in their first response also concurred or dissented in their second one 81.9% of the time. These data therefore suggest that justices who decided to wait as their initial response tended to have more far-reaching concerns than those who made suggestions or threats, given that the latter justices subsequently joined the majority opinion more frequently. It also seems likely that those justices who circulated a separate opinion were accommodated less often by the author since their incidence of joining the majority was lower than for other justices.

### Conclusion

Because opinions contain legal rules that provide guidelines to lower courts and to parties beyond those directly involved in a particular case, justices of the Court attempt to influence the final shape of majority opinions—often, according to the evidence considered here, guided by their policy objectives. Although majority coalition justices regularly refrain from joining the first draft of the Court's opinion, it is important to recognize that 80.5% of all first responses are simple "joins." We suspect that this occurs, in part, due to preemptive accommodation by opinion authors, in which the author accommodates a justice's concern in the first draft of the opinion and thus decreases a justice's incentive to reply (see Spriggs, Wahlbeck, and Maltzman 1998). Yet, despite their relative infrequency at the individual justice level, in 58.8% of cases members of the majority conference coalition bargained with the opinion author.

More importantly, our statistical results suggest that justices understand that their choices can entail different costs and benefits, and they make choices based on the implication the choices have for securing their policy objectives. Justices' responses to opinion drafts therefore result from their ideological distance from the opinion as well as the strategic environment of a case, including the size of the conference coalition and the author's past level of cooperation with them. Justices' calculations about appropriate tactics are also tempered by the nature of any given case and the justices' own skills and talents—such as the relative importance and complexity of a case and the amount of time justices are able to commit to taking on new writing assignments. Our results therefore suggest that justices are indeed rational actors—systematically making judgments about the most efficacious tactic to secure favored outcomes.

Students of judicial politics have largely come to embrace the power of the attitudinal model to explain the final votes cast by Supreme Court justices. There is a striking predictability of justices' voting behavior based on their ideological preferences. This study of justices' tactics in responding to draft opinions adds a new dimension to our portrait of the justices as predictably rational actors seeking to secure their favored policy outcomes. Justices, however, are not simply driven by their attitudes: they appear to be highly strategic political actors in that their responses to their colleagues are shaped by preferences but constrained as well by tactical considerations endemic to the bench.

*Manuscript submitted 4 April 1997*

*Final manuscript received 12 November 1997*

### References

- Aldrich, John H., and Forrest D. Nelson. 1984. *Linear Probability, Logit, and Probit Models*. Newbury Park, CA: Sage.
- Astrup v. Immigration and Naturalization Service*. 1971. 402 U.S. 509.

- Axelrod, Robert. 1984. *The Evolution of Cooperation*. New York: Basic Books.
- Baum, Lawrence. 1989. *The Supreme Court*. 3d ed. Washington, DC: Congressional Quarterly Press.
- Baum, Lawrence. 1996. "How Strategic Are Judges?" Presented at the annual meeting of the Midwest Political Science Association, Chicago.
- Black, Hugo L. 1970. Memo to William J. Brennan, March 26. Available in Justice William J. Brennan's papers, Box 216. Washington, DC: Library of Congress.
- Blackmun, Harry A. 1973. Memo to Thurgood Marshall, April 2. Available in Justice William J. Brennan's papers, Box 303. Washington, DC: Library of Congress.
- Brennan, William J. 1960. "State Court Decisions and the Supreme Court." *Pennsylvania Bar Association Quarterly* 31(June): 393-407.
- Brenner, Saul, and Harold J. Spaeth. 1988. "Ideological Position as a Variable in the Authoring of Dissenting Opinions on the Warren and Burger Courts." *American Politics Quarterly* 16(July): 317-28.
- Burger, Warren E. 1971. Memo to Hugo L. Black, May 20. Available in Justice William J. Brennan's papers, Box 247. Washington, DC: Library of Congress.
- Clark, Tom C. 1959. "Internal Operation of the United States Supreme Court." *Judicature* 43 (August): 45-51.
- Cook, Beverly B. 1993. "Measuring the Significance of U.S. Supreme Court Decisions." *Journal of Politics* 55(4): 1127-39.
- Cooper, Phillip J. 1995. *Battles on the Bench: Conflict inside the Supreme Court*. Lawrence: University Press of Kansas.
- Danielski, David J. 1968. "The Influence of the Chief Justice in the Decisional Process of the Supreme Court." In *The Federal Judicial System: Readings In Process and Behavior*, ed. Thomas P. Jahnige and Sheldon Goldman. New York: Holt, Rinehart and Winston.
- Detroit and Toledo Shore Line v. United Transportation Union*. 1969. 396 U.S. 142.
- Elster, Jon. 1986. *Rational Choice*. New York: New York University Press.
- Epstein, Lee. 1993. "Interest Group Litigation during the Rehnquist Court Era." *Journal of Law and Politics* 9(Summer): 639-717.
- Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. Washington, DC: Congressional Quarterly Press.
- Epstein, Lee, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker. 1994. *The Supreme Court Compendium: Data, Decisions, and Developments*. Washington, DC: Congressional Quarterly Press.
- Gibson, James L. 1997. United States Supreme Court Judicial Data Base—Phase II.
- Ginsburg, Ruth Bader. 1990. "Remarks on Writing Separately." *Washington Law Review* 65 (January): 133-50.
- Greene, William H. 1993. *Econometric Analysis*. 2d ed. New York: Macmillan.
- Griggs v. Duke Power Company*. 1971. 401 U.S. 424.
- Hagle, Timothy. 1993. "'Freshmen Effects' for Supreme Court Justices." *American Journal of Political Science* 37(November): 1142-57.
- Hagle, Timothy M., and Harold J. Spaeth. 1991. "Voting Fluidity and the Attitudinal Model of Supreme Court Decision Making." *Western Political Quarterly* 44(March): 119-28.
- Harlan, John M. 1971. Memo to Warren E. Burger, June 7. Available in Justice William J. Brennan's papers, Box 237. Washington, DC: Library of Congress.
- Hawaii v. Standard Oil*. 1972. 405 U.S. 251.
- Howard, J. Woodford, Jr. 1968. "On the Fluidity of Judicial Choice." *American Political Science Review* 62(March): 43-56.
- Johnson, Timothy R. 1996. "Bargaining, Strategy, and Supreme Court Decision Making." Presented at the annual meeting of the Midwest Political Science Association, Chicago.
- King, Gary. 1991. "'Truth' Is Stranger than Prediction, More Questionable than Causal Inference." *American Journal of Political Science* 35(November): 1047-53.

- Knight, Jack, and Lee Epstein. 1996. "The Norm of *Stare Decisis*." *American Journal of Political Science* 40(November): 1018–35.
- Maddala, G.S. 1983. *Limited-Dependent and Qualitative Variables in Econometrics*. New York: Cambridge University Press.
- Maltzman, Forrest, and Paul J. Wahlbeck. 1996a. "May It Please the Chief? Opinion Assignment in the Rehnquist Court." *American Journal of Political Science* 40(May): 421–43.
- Maltzman, Forrest, and Paul J. Wahlbeck. 1996b. "Strategic Policy Considerations and Voting Fluidity on the Burger Court." *American Political Science Review* 90(September): 581–92.
- Maltzman, Forrest, and Paul J. Wahlbeck. 1996c. "Inside the Supreme Court: The Reliability of the Justices' Conference Records." *Journal of Politics* 58(2): 528–39.
- Murphy, Walter F. 1964. *Elements of Judicial Strategy*. Chicago: University of Chicago Press.
- O'Brien, David M. 1996. *Storm Center: The Supreme Court in American Politics*. 4th ed. New York: Norton.
- Powell, Lewis F. 1975. Memo to William H. Rehnquist, December 13. Available in Justice William J. Brennan's papers, Box 380. Washington, DC: Library of Congress.
- Powell, Lewis F. 1980. "What Really Goes On at the Court." *New York State Bar Journal* 1980 (October): 454–89.
- Rehnquist, William H. 1987. *The Supreme Court: How It Was, How It Is*. New York: Morrow.
- Riker, William H. 1962. *The Theory of Political Coalitions*. New Haven: Yale University Press.
- Riker, William H., and Donald Niemi. 1962. "The Stability of Coalitions on Roll Calls in the House of Representatives." *American Political Science Review* 56(March): 58–65.
- Rohde, David W. 1972a. "Policy Goals and Opinion Coalitions in the Supreme Court." *Midwest Journal of Political Science* 16(May): 208–24.
- Rohde, David W. 1972b. "Policy Goals, Strategic Choice, and Majority Opinion Assignments in the U.S. Supreme Court." *Midwest Journal of Political Science* 16(November): 652–82.
- Rohde, David W. 1972c. "A Theory of the Formation of Opinion Coalitions in the U.S. Supreme Court." In *Probability Models of Collective Decision Making*, ed. Richard G. Niemi and Herbert F. Weisberg. Columbus, OH: Merrill.
- Rohde, David W., and Harold J. Spaeth. 1976. *Supreme Court Decision Making*. San Francisco: W. H. Freeman.
- Schubert, Glendon. 1959. *Quantitative Analysis of Judicial Behavior*. East Lansing: Michigan State University Press.
- Schwartz, Bernard. 1985. *The Unpublished Opinions of the Warren Court*. New York: Oxford University Press.
- Schwartz, Bernard. 1988. *The Unpublished Opinions of the Burger Court*. New York: Oxford University Press.
- Schwartz, Bernard. 1990. *The Ascent of Pragmatism: The Burger Court in Action*. New York: Addison-Wesley.
- Schwartz, Bernard. 1996. *Decision: How the Supreme Court Decides Cases*. New York: Oxford University Press.
- Schwartz, Edward P. 1996. "The Proliferation of Concurring Opinions on the U.S. Supreme Court: Politics Killed the Norm." Presented at the annual meeting of the Midwest Political Science Association, Chicago.
- Segal, Jeffrey A., and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. New York: Cambridge University Press.
- Sigelman, Lee. 1984. "Doing Discriminant Analysis: Some Problems and Solutions." *Political Methodology* 10(1): 67–80.
- Simon, James F. 1995. *The Center Holds: The Power Struggle Inside the Rehnquist Court*. New York: Simon and Schuster.
- Slotnick, Elliot. 1978. "The Chief Justice and Self-Assignment of Majority Opinions." *Western Political Quarterly* 31(June): 219–25.

- Slotnick, Elliot. 1979. "Who Speaks for the Court? Majority Opinion Assignments from Taft to Burger." *American Journal of Political Science* 23(February): 60-77.
- Snyder, Eloise C. 1958. "The Supreme Court as a Small Group." *Social Forces* 36(March): 232-38.
- Spaeth, Harold J. 1994. *United States Supreme Court Judicial Database, 1953-1992 Terms*. 5th Release. Ann Arbor: Inter-University Consortium for Political and Social Research.
- Spriggs, James F., II. 1996. "The Supreme Court and Federal Administrative Agencies: A Resource-Based Theory and Analysis of Judicial Impact." *American Journal of Political Science* 40 (November): 1122-51.
- Spriggs, James F., II., Paul J. Wahlbeck, and Forrest Maltzman. 1998. "Preemptive and Responsive Accommodation on the U.S. Supreme Court." Presented at the annual meeting of the Midwest Political Science Association, Chicago.
- Stewart, Potter. 1969. Memo to Hugo L. Black, December 2. Available in Justice William J. Brennan's papers, Box 205. Washington, DC: Library of Congress.
- Stewart, Potter. 1971. Memo to Warren E. Burger, February 8. Available in Justice William J. Brennan's papers, Box 239. Washington, DC: Library of Congress.
- Stewart, Potter. 1972. Memo to Thurgood Marshall, February 4. Available in Justice William J. Brennan's papers, Box 258. Washington, DC: Library of Congress.
- Stimson, James A. 1985. "Regression in Space and Time: A Statistical Essay." *American Journal of Political Science* 29(November): 914-47.
- Ulmer, S. Sidney. 1959. "An Empirical Analysis of Selected Aspects of Lawmaking of the United States Supreme Court." *Journal of Public Law* 8 (Fall): 414-36.
- Ulmer, S. Sidney. 1971. "Earl Warren and the Brown Decision." *Journal of Politics* 33(3): 689-702.
- Ulmer, S. Sidney. 1986. "Exploring the Dissent Patterns of the Chief Justices: John Marshall to Warren Burger." In *Judicial Conflict and Consensus: Behavioral Studies of American Appellate Courts*, ed. Sheldon Goldman and Charles M. Lamb. Lexington: University of Kentucky Press.
- Wahlbeck, Paul J., James F. Spriggs II, and Forrest Maltzman. 1998. "Marshalling the Court: Bargaining and Accommodation on the U.S. Supreme Court." *American Journal of Political Science* 42(January): 294-315.
- Walker, Thomas G., Lee Epstein, and William J. Dixon. 1988. "On the Mysterious Demise of Consensual Norms in the United States Supreme Court." *Journal of Politics* 50(2): 361-89.
- Westin, Alan F. 1958. *The Anatomy of a Constitutional Law Case*. New York: Macmillan.
- White, Halbert. 1980. "A Heteroskedasticity-Consistent Covariance Matrix Estimator and a Direct Test for Heteroskedasticity." *Econometrica* 48(May): 817-38.
- Wood, Sandra L., Linda Camp Keith, Drew Noble Lanier, and Ayo Ogundele. 1998. "'Acclimation Effects' for Supreme Court Justices: A Cross-Validation, 1888-1940." *American Journal of Political Science* 42(April): 690-97.
- Woodward, Bob, and Scott Armstrong. 1979. *The Brethren: Inside the Supreme Court*. New York: Simon and Schuster.

James F. Spriggs II is assistant professor of political science, University of California-Davis, Davis, CA 95616.

Forrest Maltzman is associate professor of political science, George Washington University, Washington, DC 20052.

Paul J. Wahlbeck is assistant professor of political science, George Washington University, Washington, DC 20052.